

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CERLESTINE EVANS and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, Calif.

*Docket No. 96-1684; Submitted on the Record;
Issued March 13, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has any residuals of her January 15, 1990 accepted employment injuries after March 13, 1996, the date the Office of Workers' Compensation Programs terminated her compensation benefits.

The Office accepted that on January 15, 1990 appellant sustained left knee strain, left thigh strain, and a left hand contusion when she fell on the steps of the employing establishment. Magnetic resonance imaging (MRI) on May 10, 1990 demonstrated that appellant had a complex tear of the medial meniscus from the mid-zone extending into the posterior horn of the medial meniscus with associated effusion. This condition was not, however, accepted by the Office as being employment related. On January 9, 1991 appellant underwent left knee arthroscopic surgery authorized by the Office, which consisted of chondroplasty of the medial and patellofemoral compartments, and partial resection of the medial and lateral menisci. Although arthroscopic surgery had been authorized by the Office, this does not mean that the conditions for which the surgery was performed were accepted by the Office.¹

Appellant was disabled from January 25 to 28, 1990; returned to limited duty on January 29, 1990; had partial disability through April 7, 1990; had partial and total disability between April 12 and July 28, 1990; had total disability from July 29, 1990 through March 28, 1991; returned again to limited duty but had partial disability again from May 5 to August 23, 1991; had total disability from August 25 to December 13, 1991; partial disability from December 14 to 31, 1991; total disability from January 1 to December 12, 1992; partial and total disability between May 30, 1993 and May 29, 1994; and total disability thereafter.

¹ See *James F. Aue*, 25 ECAB 151 (1974) (the mere fact that the Office authorized and paid for treatment does not establish that the condition for which the employee received treatment was employment related); see also *Gary L. Whitmore*, 43 ECAB 441 (1992).

In an April 20, 1994 second opinion report, Dr. Russell W. Nelson, a Board-certified orthopedic surgeon, stated that appellant had persistent aching pain with frequent recurrent sharp stabbing pains in her left knee, mostly noted at night, left knee instability and giving way, and increased left knee pain associated with standing and walking more than 10 to 30 minutes. He diagnosed left knee osteoarthritis, lumbar spine degenerative disc disease, and exogenous obesity, and he opined that her total disability from work ceased following appellant's March 1991 return to light duty. Dr. Nelson, however, did not provide rationale for that conclusion. He stated that he did not detect any total disability from her work injury after that time, and that she was permanent and stationary, but he did not provide any rationale for that conclusion either or provide any further discussion or rationale as to how or why, if appellant's employment-related injuries had ceased in March 1991, she had periods of both partial and total compensable disability thereafter in 1991, 1992, 1993 and 1994. Dr. Nelson opined that appellant could return to light duty in a sedentary position with lifting restrictions. He also opined that appellant's left knee osteoarthritis had developed prior to her employment injury, which only "brought her symptoms out," but he failed to clarify whether this meant appellant's 1990 injuries aggravated her underlying osteoarthritis or to explain exactly what he meant.

In a memorandum of a November 29, 1994 conference with the Office, Dr. V.Y. Height, a Board-certified internist, recounted an inaccurate history of case and advised the employing establishment that physical therapy had been recommended for nonindustrial conditions, that the superficial soft tissue injuries diagnosed in 1990 had resolved, and that appellant's continued subjective symptoms were related to her preexisting advanced degenerative arthritic condition and its natural progression. Dr. Height, however, did not actually examine appellant or provide any rationale for his conclusions. He did note that in February 1994 Dr. Nelson had indicated that appellant had no disability since 1991 in terms of the work-related condition of the left knee, but again failed to provide rationale or an explanation as to why.

A February 2, 1995 MRI scan of the left knee was reported as showing a complex tear involving the anterior and posterior horns as well as the body of the medial meniscus, medial collateral ligament swelling, a bone bruise within the subarticular region of the medial tibial plateau, suggestive osteochondritis dissecans in the subarticular region of the medial femoral condyle, marked degenerative osteoarthritic changes and moderate joint effusion.

By attending physician's supplemental form report dated February 2, 1995, Dr. William Simpson, a Board-certified orthopedic surgeon, diagnosed internal derangement of the left knee and lumbar musculoligamentous injury and checked "yes" indicating that he believed appellant's present conditions were due to her accepted employment injuries. He also anticipated that appellant's disability would continue for 90 days or longer.

By narrative report dated February 9, 1995, Dr. Simpson, appellant's treating physician, noted that a February 2, 1995 MRI confirmed a left knee internal derangement consistent with a complex tear of the medial meniscus, and opined that she was disabled and needed another arthroscopic procedure because of the chronicity of her symptoms. In an April 10, 1995 report, Dr. Simpson opined that appellant needed surgery for marked internal derangement of her left knee which caused functional impairment and gait alteration. He opined that appellant's

conditions were due to her accepted employment injury, diagnosed internal derangement of the left knee, and opined that her disability would continue for 90 days or longer.

On May 17, 1995 the Office referred appellant back to Dr. Nelson for another second opinion report. By report dated August 2, 1995, Dr. Nelson opined that appellant's further symptoms were progressively increased in the osteoarthritic degeneration of the medial side of her knee, that this was causing her the significant knee pain, and that arthroscopic surgery and debridement were not supported by the literature as being beneficial for this type of knee pain. Dr. Nelson, however, did not provide any supporting medical rationale or any explanation of how he reached these conclusions. He recommended that the treatment appellant needed was a total knee arthroplasty. Dr. Nelson opined that appellant had preexisting arthritis which had degenerated with her standing and walking and with her significant weight, and he stated that he did not see any increase in her disability from her employment injury, or any period of temporary disability over the preceding year and one half due to her employment injury. However, he provided no further explanation or rationale in support of these conclusions. Dr. Nelson opined that appellant could perform light sedentary duty.

On January 16, 1996 Dr. Simpson reiterated his earlier reports noting that appellant had left knee internal derangement which he felt was due to her accepted employment injuries, which caused her diminished functional capacity and gait derangement, and which would totally disable her for at least another 90 days. Again he recommended surgical repair.

On February 8, 1996 the Office issued appellant a notice of proposed termination of compensation which concluded that the medical evidence established that she no longer had objective findings causally related to her January 15, 1990 accepted employment injuries. The Office found that Dr. Nelson's report constituted the weight of the medical opinion evidence because he reviewed the file, examined appellant, had a statement of accepted facts, and was Board-certified. The Office further stated that it gave Dr. Nelson's report additional weight because he had previously performed a second opinion examination in 1994, such that he was able to assess changes in appellant between 1994 and 1995 and had the benefit of a complete and accurate knowledge of appellant's medical and factual history. The Office also stated that Dr. Simpson's reports were of diminished probative value as he knew appellant had degenerative arthritic left knee changes yet stated that surgery was needed to avoid development and progression of degenerative changes, and because he failed to explain how appellant's employment injury contributed to her left knee degenerative arthritic condition.

By decision dated March 13, 1996, the Office terminated appellant's compensation effective that date restating the rationale presented in its notice of proposed termination.

Appellant requested reconsideration on April 5, 1996 and in support she submitted further form reports and narrative reports from Dr. Simpson restating the content of his earlier reports, and adding that appellant would need extensive physical therapy after surgery due to muscle atrophy which occurred during conservative treatment. Dr. Simpson also disagreed with Dr. Nelson's conclusions and stated that current orthopedic literature supported his opinion and that Dr. Nelson's suggestion of total knee replacement was inappropriate.

By decision dated April 16, 1996, the Office denied modification of the prior decision finding that the evidence submitted was cumulative and insufficient to warrant modification. The Office found that Dr. Nelson had declared that appellant's current condition was due to arthritis rather than due to the 1990 injuries and it attempted to state that Dr. Nelson's opinion was thorough and well rationalized.²

The Board finds that this case must be reversed.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ The Office did not meet its burden of proof to terminate appellant's compensation in this case.

In the instant case, there is a conflict in medical opinion between Board-certified orthopedic surgeons. Dr. Nelson concluded, without accompanying explanation or medical rationale, that appellant's employment injuries had ceased by March 1991, and that after that time she had no disability related to her accepted conditions, yet he offered no explanation for her subsequent periods of compensable recurrent partial and total disability, and he failed to explain what he meant when he said appellant's employment injuries brought her symptoms out.

Dr. Simpson, on the other hand, continued to support that appellant's current left knee condition was causally related to her accepted employment injuries, also without explanation or medical rationale, to declare that appellant remained totally disabled due to her employment injuries, and to request authorization for corrective surgery.

These opinions are in conflict, and as both examining physicians' opinions are equally unrationalized and without supporting explanation, neither are entitled to special weight. Further, the Board notes that the second opinion physician's second report is not entitled to special or additional weight because he had seen appellant previously and can compare his findings over time.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

² The Office actually stated that "Dr. Simpson's opinion is through [sic] and well rationalized."

³ *Harold S. McGough*, 36 ECAB 332 (1984); see Federal (FECA) Procedure Manual, Chapter 2.812.3 (March 1987).

⁴ See *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

Therefore, as the medical opinion evidence in this case is in conflict, the Office did not meet its burden of proof to terminate compensation, and the termination decision must be reversed. Further, as the termination decision is being reversed, the subsequent decision is moot.

Consequently, the decisions of the Office of Workers' Compensation Programs dated April 16 and March 13, 1996 are hereby reversed.

Dated, Washington, D.C.
March 13, 1998

George E. Rivers
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member